Supreme Court
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In the Supreme Court of the United States

OCTOBER TERM 1973

NO. 74-57

JOHN DYKMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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in the
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OCTOBER TERM 1973

NO. ————

JOHN DYKMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

The Petitioner, JOHN DYKMAN, prays that this Court issue its Writ of Certiorari to the Supreme Court of the State of Florida, to review the judgment of the Florida Supreme Court entered in the above on December 12, 1973.

Petition for Rehearing was denied by the Florida Supreme Court on June 10, 1974.

CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at 294 So.2d 633 (Fla. 1973). The opinion is set forth in its entirety in the Appendix hereto (A. 1-14).

JURISDICTION

The opinion of the Florida Supreme Court was rendered on December 12, 1973. The Florida Supreme Court entered its Order Denying Petition for Rehearing on June 10, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) because Petitioner has been denied due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, by virtue of the decisions and judgments of the Florida Supreme Court and the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

The decision on which review is sought was rendered by the highest Court of the State. All appellate remedies of the State Courts with respect to the constitutionality of the Dade County, Florida Grand Jury, have been exhausted as to the questions presented herein.

QUESTIONS PRESENTED

1. Whether a defendant in a criminal prosecution for murder has been denied procedural and substantive due process of law as guaranteed by the Fifth and Four-

teenth Amendments to the United States Constitution, and compulsory service of process and the right to confront his accusers, guaranteed by the Sixth Amendment to the United States Constitution, where, having alleged the grand jury which indicted him was improperly composed and was selected in an unconstitutional manner and was not drawn from a cross section of the community, he was denied the right to an evidentiary hearing to prove said challenge and was further denied access to the master grand jury list from which the grand jury was selected.

2. Whether a defendant has been denied his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, when his challenge to the selection process and composition of the grand jury which indicted him was ruled upon by a trial judge who oversaw the operation of said grand jury and participated in the selection of its members.

3. Whether a defendant can be said to have waived his pre-trial challenge to the grand jury which was impaneled and sworn **prior** to the commission of the acts for which said defendant was subsequently indicted, where a State Statute requires all challenges to be made **prior** to the impaneling and swearing of the grand jury, thus resulting in a denial of said defendant's rights to procedural and substantive due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

4. Whether Laws of Florida, Chapter 70-1000 (amending Chapter 57-550), which requires Circuit Court trial judges to select and supervise the grand jury, denied the

defendant equal protection of the law and due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as written and as applied.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The Federal questions were raised in these proceedings by the pretrial motions filed by the Petitioner (A. 34-40). Petitioner's rights as guaranteed under the Fourteenth Amendment were violated by the Trial Court's denial and Appellate affirmance of said denial of all motions which sought to prove that Petitioner's Fifth, Sixth and Fourteenth Amendment rights were being denied by operation of the Dade County, Florida, Grand Jury system.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in their entirety in the Appendix:

The Fifth Amendment to the United States Constitution, (A. 15).

The Sixth Amendment to the United States Constitution, (A. 15).

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, (A. 15-16).

Florida Statutes §§ 905.02-.05, (A. 16-19).

Laws of Florida, Chapter 57-550, (A. 21-25).

Laws of Florida, Chapter 70-1000, (A. 25-27).

STATEMENT OF THE CASE

This was a criminal action commenced by the filing of a Grand Jury Indictment returned on September 19, 1972, by the 1972 Dade County, Florida, Spring Term Grand Jury, against the Petitioner, charging him with the First Degree Murder of his wife (Olive Dykman) (A. 27). On September 29, and again on October 13, 1972, Criminal Informations based on precisely the same facts and testimony presented to the Dade County Grand Jury, were filed against the Petitioner charging him with First Degree Murder (A. 29).[1]

On October 10, 1972, the Petitioner filed a Motion to Dismiss [the] Underlying Indictment and [the first] Information and for Evidentiary Hearing (A. 33), a Motion for Production of Grand Jury Master List (A. 39), and a Motion to Dismiss [the] Information[2] (A. 37).

[1]The Dade County State Attorney's Office developed a policy of filing Informations based on Indictments, as a result of numerous challenges to the constitutionality of the Dade County Grand Jury method of selection, which had been developed as a result of the *Seay*, *Silva* and *Rojas*, infra cases. In addition, the constitutional requirement of filing an Indictment instead of an Information, in all capital cases, was obviated by this Court's decision in *Furman v. Georgia*, 408 U.S. 346 (1972).

[2]The first Information was voluntarily dismissed by the State Attorney because of certain formal defects which are not here relevant, other than to point out that the first Information was, according to the jurat attached to said Information, based upon facts alleged in the subject Indictment presented to the Grand Jury under attack instanter. The second Information, filed on October 13, 1972, also alleged that it was based on the testimony presented to the Dade County Grand Jury, (A. 31).

Said Motions alleged that the Grand Jury which indicted the Petitioner, was selected improperly and was not representative of the community from which it was drawn. The allegations were detailed and specific. Petitioner sought to prove his allegations by obtaining the Master Grand Jury List and holding an evidentiary hearing.

The Trial Court denied all of Petitioner's Motions relating to his attack on the 1972 Dade County Spring Term Grand Jury (A. 33), without the benefit of an evidentiary hearing, despite Petitioner's argument that the Grand Jury was clearly a "blue ribbon" Grand Jury by virtue of the manner in which it was selected. After a Sanity Hearing on November 8, 1972, Petitioner (then 78 years old), was declared competent to stand trial.

Petitioner, after a Jury Trial, was found Guilty of Second Degree Murder and sentenced to thirty (30) years in prison, which he is presently serving.

STATE APPELLATE ACTION

Initially, Petitioner filed his appeal in the Florida District Court of Appeal, Third District, which, upon Motion of Petitioner, transferred it to the Supreme Court of Florida.[3] The Florida Supreme Court, without benefit

[3]As a result of the opinion of the Florida Supreme Court, remanding a portion of the Appeal to the Third District Court of Appeal, in essence, Petitioner has a "bifurcated" Appeal, in that Petitioner's Appeal on his conviction (and the merits thereof), is scheduled to be argued in the Third District Court of Appeal, on July 31, 1974. That Court will not in any way reach the issues presented to this Court in the instant Petition for Writ of Certiorari.

of oral argument, despite a request for same[4], held that the denial of Petitioner's Grand Jury challenge was proper, as the Motions were not supported by any **proof** that discrimination may be present, and that Petitioner had not complied with Florida Statute §§ 905.03 and 905.05. The Florida Supreme Court further upheld the constitutional validity vel non of Laws of Florida, Chapter 57-550, and Chapter 70-1000. All other issues on appeal were remanded to the Third District Court of Appeal for further consideration.[5]

REASONS FOR GRANTING THE WRIT

The Trial Court instanter, purportedly based on previous trial court rulings in **Silva v. State** and **Seay v. State,** (now United States Supreme Court Case No. 73-6549), and **Rojas v. State,** (now United States Supreme Court Case No. 73-6669), summarily denied all of Petitioner's Motions challenging the Grand Jury which indicted him. The Florida Supreme Court affirmed this action, stating it was proper, as Petitioner's Motions lacked allegations supported by facts, or an affidavit (A. 12). The Florida Supreme Court, by relying on its previous decision in **Rojas,** supra, obviously weighed constitutional rights against judicial administrative efficiency. By relying on **Rojas,** supra, the Florida Supreme Court obviously lent more weight to the need for judicial administrative efficiency, than to Petitioner's Fifth, Sixth and Fourteenth

[4]Florida Appellate Rules, 32 F.S.A., specifically permit and require, in certain cases such as that instanter, oral argument. Rule 3.10(a), puts the burden on an Appellant to apply for oral argument. That was done instanter. Rule 3.10(g)(2), specifically requires oral argument in all appeals in which a final judgment directly passes upon the validity of a State Statute, as here.

[5]Those issues are not material here, see footnote 3 supra.

Amendment rights. As the United States Supreme Court has recently held with regard to the balance between such constitutional rights and the Court's interest in judicial expediency, "***we remain unpersuaded that 'the additional time and expense possibly involved . . . will seriously handicap the effective functioning of the Courts.' **Bloom v. Illinois,** supra, 391 U.S. at 208-209. Due process cannot be measured in minutes and hours or dollars and cents." **Taylor v. Hayes,** ____ U.S. ____, 15 Cr.L.3294, 3298, U.S. Supreme Court Case No. 73-473 (June 26, 1974).

The Florida Supreme Court, in its opinion (A. 1), held that Petitioner waived his challenge to the Grand Jury by failing to raise the challenge **prior** to the impaneling and swearing of the Grand Jury as required by Florida Statutes §§ 905.02.-05 (A. 16). The Dade County, Florida, Spring Term Grand Jury was sworn and impaneled on **May 9, 1972.** The Indictment was returned against Petitioner, on **September 19, 1972** (A. 27), for a crime alleged to have occurred between **June 1, and July 31, 1972** (A. 27). Thus, it would have been **impossible** to have made such a "timely" challenge. As a practical matter, Florida Statute §§ 905.02-.05 were enacted originally when grand juries were impaneled in Florida, only after the commission of a capital offense. In modern times, compliance with the Statute is impossible because grand juries in Dade County, Florida, are impaneled every six (6) months, and sit continuously.

Petitioner did, **at his first opportunity,** raise prior to Trial, his challenge to the Grand Jury which issued the Indictment against him. Yet the Florida Supreme Court held that the challenge was raised too late. Petitioner raised his challenge pretrial, unlike **Tollett v. Henderson,**

411 U.S. 258 (1973), and as such, the decision below denies the Petitioner both substantive and procedural due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

This Court has asserted time and time again that a defendant is entitled, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, to be charged by an Indictment returned by a Grand Jury drawn from a pool [which is] truly representative of the community. **Cassell v. State of Texas,** 339 U.S. 282 (1950). Petitioner herein contended that the Grand Jury which indicted him was neither drawn from such a pool, nor representative of the community, and that the method of selection used pursuant to Laws of Florida, Chapter 70-1000 (amending Chapter 57-550), was invalid and resulted in an illegally drawn and selected Grand Jury returning an Indictment against Petitioner.

Moreover, the refusal to grant Petitioner's request for an evidentiary hearing, denied to Petitioner his Sixth Amendment rights of both compulsory service of process and the right of the accused to confront, and cross-examine, his accusers.

Valid grand jury selection is a constitutionally protected right. One who has been indicted by an improperly selected grand jury is denied equal protection of the laws as guaranteed by the Fourteenth Amendment, **Reece v. State of Georgia,** 350 U.S. 85 (1955).

Petitioner sought merely to assert this right and to prove the allegations set forth in his Motions; to wit: discrimination against certain specific groups in the com-

munity by the very method of operation of the selection process. In addition, under **State v. Demetree**, 213 So.2d 709 (1968), a Florida Supreme Court Case, Petitioner had the burden of showing exclusion in the composition of the Master Grand Jury List and not merely the particular grand jury, (i.e. it is the composition of the "Master List", and not the particular grand jury itself, which returns the indictment which determines whether equal protection of the law has been denied), see (A. 39).

The Trial Court, however, denied the production of the list of names on the Master Grand Jury List, and further denied any evidentiary hearing on the Grand Jury challenge, thus, completely preventing the Petitioner from meeting, or seeking to meet, this burden.

In **Michel v. State of Louisiana**, 76 S.Ct. 158 (1955), this Court stressed that due process not only provides the right to object to a grand jury, but that right presupposes an **opportunity to exercise that right.** Here, this opportunity was denied. The Florida Supreme Court has compounded the denial of Petitioner's constitutional rights by holding that the administration of justice cannot be interfered with by a **mere** challenge unsupported by documents and proof. Ironically, the necessary proof would have been available had the evidentiary hearing been held, and had the Master List been produced. Is this such an onerous burden as would halt efficient judicial progress? The Petitioner was denied all access to the evidence necessary to prove his challenge to the Grand Jury. Yet in order for his Motions to be fairly heard, he was required to produce certain (non-confidential) Grand Jury matters to which the Trial and Florida Supreme Courts have denied Petitioner access.

This identical issue was resolved by the North Carolina Supreme Court in **State of North Carolina v. Covington,** 258 N.C. 501, 128 S.E.2d 827 (1963), contrary to the Florida Supreme Court's ruling instanter. The Florida Supreme Court, in an attempt to distinguish the **Covington** case, pointed out that the defendant's challenge in that case was supported by an affidavit by the attorney setting forth an allegation that there was discrimination based on some "information" and his "belief". There is, in fact, no distinction between such an affidavit and the Motion prepared herein by Counsel, as an Officer of the Court, setting forth his "belief" and "information", as was done instanter, (A. 33). Parenthetically, no one in the Dade County, Florida, Criminal Justice System, has ever publicly denied that the method employed in jury selection results in the selection of a "blue ribbon" Grand Jury, with some obvious attempts since **Silva, Seay, Rojas,** and **Dykman,** supra, to **systematically include** certain minority groups in the Master Grand Jury Pool.

Laws of Florida, Chapter 57-550, as amended by Chapter 70-1000, requires the Dade County Circuit Court Judges to select the members of the grand jury and to oversee the operation of the grand jury (A. 20). However, it was one of these same judges who, when faced with Petitioner's challenge to that action, ruled on the constitutionality of the laws, as written, and as applied. Petitioner was thus denied the right to a judge who was totally "neutral" on those matters upon which he must rule as guaranteed under due process of the Fourteenth Amendment. The actions of the Trial Court and the affirmance by the Florida Supreme Court runs contrary to the well established requirement of judicial

neutrality, as a matter of due process of law. See: **Tumey v. State of Ohio,** 273 U.S. 510 (1927); **Coolidge v. New Hampshire,** 403 U.S. 443 (1971).

The Florida Supreme Court held that Petitioner waived his challenge to the Grand Jury, as he failed to raise the challenge **prior** to the impaneling and swearing of said Grand Jury. It was factually and legally impossible to raise the challenge prior to the impanelment of the Grand Jury where the alleged commission of the offense occurred **after** the Grand Jury was impaneled.

Petitioner, at his first opportunity, raised, prior to trial, his challenge to the Grand Jury which indicted him. Yet, the Florida Supreme Court held that the challenge was not timely, and that mere **administrative considerations governing the Grand Jury outweighed Petitioner's constitutional rights.**

Finally, Petitioner contends that this Court should issue the Writ sought, as the decision entered below by the Florida Supreme Court, affirms the constitutionality, as written (and purportedly upon the facts) of Laws of Florida, Chapter 70-1000. That erroneous conclusion indicates another substantive departure from the law, as there were no facts to support the Florida Supreme Court's finding that, as applied, Chapter 70-1000 was constitutional and, in fact, the Petitioner challenged those provisions, as written, also, as denying him equal protection of the laws, and due process of the law as guaranteed him by the Fifth and Fourteenth Amendments, but was denied the right and ability to obtain the proof necessary to establish this challenge.

CONCLUSION

The Petitioner herein was denied basic fundamental rights guaranteed to him by the United States Constitution. He seeks relief in this Court to restore those rights to him. Based on the arguments and authorities cited herein, Petitioner, JOHN DYKMAN, respectfully requests this Honorable Court to grant a Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.

Respectfully submitted,

JOEL HIRSCHHORN, P. A.

BY: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari To The Supreme Court of the State of Florida, was mailed this 31st day of July, 1974, to the Attorney General of the State of Florida, 1350 Northwest 12th Avenue, Miami, Florida, and to the Honorable Sid J. White, Clerk of the Supreme Court of the State of Florida, Supreme Court Building, Tallahassee, Florida.

JOEL HIRSCHHORN

APPENDIX

APPENDIX

JOHN DYKMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 44142.

Supreme Court of Florida.
Dec. 12, 1973.

Rehearing Denied June 10, 1974.

Appeal from the Criminal Court of Record in and for Dade County, of Arthur E. Huttoe, J., on transfer from the District Court of Appeal, the Supreme Court, Dekle, J., held that denial of motions to suppress evidence obtained in search did not support a direct appeal to the court, that denial of motion requesting evidentiary hearing on allegations that the petit jury venire was improperly drawn did not support a direct appeal, that denial of motion to dismiss based on contention that grand jury was improperly constituted did not support a direct appeal, that denial of motion to dismiss based on contention that statutes providing means for selecting grand jury pool were unconstitutional gave Court jurisdiction and that such statutes are constitutional.

Remanded.

Ervin, J., dissented.

1. Courts —216

Supreme Court's direct appeals jurisdiction includes cases in which trial court inherently passes upon constitutionality of a statute; but Court may not accept direct appeal based upon an inherent construction of a constitutional provision; there must be an express ruling by trial court explaining, defining, or stating a view which eliminates some existing doubt as to constitutional provision in order to support a direct appeal; Supreme Court's direct appeals jurisdiction is not properly invoked merely because trial court may apply a constitutional provision to facts before it but is properly invoked only where trial court expressly construes constitutional provision involved. F.S.A.Const. art. 5, § 3(b)(1).

2. Courts —216

Where trial court in determining that search of house was valid did not have presented to it any issues of statutory validity, did not rule on validity of any federal or state statute, and did not expressly construe, define or overtly explain meaning of any constitutional provision but, in ruling upon motions to suppress evidence obtained in search, merely applied undisputed propositions of law to the existing facts trial court's denial of motions, even if erroneous, did not support a direct appeal to the Supreme Court. F.S.A.Const. art. 5, § 3(b)(1).

3. Courts —216

Where motion requesting evidentiary hearing on allegation that means by which petit jury venire was selected were constitutionally improper in that certain identifiable

groups were excluded was not supported by affidavit based upon information and belief or state facts sufficient to raise reasonable suspicion that venire was improperly drawn and trial court in denying request for hearing did not pass upon validity of any state or federal statute or construe any constitutional provision but merely ruled that motion did not present sufficient basis for hearing, denial of motion did not support a direct appeal to the Supreme Court. F.S.A.Const. art. 5, § 3(b)(1).

4. Grand Jury —19

Failure to timely raise objections to composition of grand jury constituted a waiver of right to attack jury's composition. F.S.A. §§ 905.03, 905.05.

5. Jury —118

Before a court is required to permit a full scale investigation of its jury panel, panel must be shown to be suspect; and challenger must assert facts tending to raise a doubt as to whether panel may be improperly constituted.

6. Courts —216

Where trial court in denying portion of motion to dismiss based upon assertion that grand jury panel was improperly drawn and in denying request for evidentiary hearing and motion for production of grand jury master list and motion to depose chairman and clerk of grand jury commission did not pass on validity of a statute nor expressly construe any constitutional provision but denied such motions because they were not supported by any

factual assertion sufficient to raise suspicion that grand jury pool was improperly constituted and were not supported by an affidavit setting forth facts sufficient to raise reasonable suspicion of discriminatory selection, denials of such motions did not support a direct appeal to the Supreme Court. F.S.A.Const. art. 5, § 3(b)(1); U.S.C.A. Const. Amd. 14.

7. Courts —216

Trial court by denying motion to dismiss information based on contention that statutes providing the means for the selection of grand jury pool were unconstitutional inherently held statutes to be constitutional; thus, Supreme Court had jurisdiction to accept and hear direct appeal on such statutory point. Laws 1957, c. 57-550; Laws 1970, c. 70-1000; F.S.A. Const. art. 5, § 3(b)(1).

8. Grand Jury —2

Statutes providing for the means by which grand jury pool is selected are constitutional. Laws 1957, c. 57-550; Laws 1970, c. 70-1000.

Joel Hirschhorn, Miami, for appellant.

Roberte L. Shevin, Atty. Gen., and Peter F. LaPorte, Asst. Atty. Gen., for appellee.

DEKLE, Justice.

This cause comes to us pursuant to an order of the District Court of Appeal, Third District, transferring the

case to this Court.[1] For the reasons set forth below, we accept the transfer only as to the trial court's upholding of the validity of Chapters 57-550 and 70-1000 relating to grand jury selection and remand the cause to the district courts as to the remaining issues.

The basis of the transfer, as revealed by the motion therefor, was asserted to be the trial court's ruling on the constitutionality of various state statutes. Of the seven points raised on appeal, three (competency to stand trial, admissibility of certain hearsay evidence, and giving of certain jury instructions) are clearly outside the scope of our jurisdiction as to direct appeals under Article V, § 3(b)(1), of the State Constitution. Thus, jurisdiction in this Court, if present, must rest upon one of the remaining four issues raised on appeal.

JURISDICTION

[1] The jurisdiction of this Court on direct appeal from an order of a trial court is governed by the provisions of Article V, § 3(b)(1) of our constitution. This section provides that the Supreme Court shall hear appeals from final judgments and orders of trial courts "initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution." Although our direct appeals jurisdiction includes cases in which the trial court inherently passes upon the constitutionality of a statute, we may not accept a direct appeal based upon an inherent con-

[1]The District Court transferred the cause to this Court pursuant to Fla.Const. art. V, § 3(b)(1), F.S.A. vesting direct appeals jurisdiction in this Court where the trial court initially passed upon the constitutional validity of a state statute. Transfer is authorized by F.A.R. 2.1(a)(5)(d), 32 F.S.A.

struction of a constitutional provision; it is insufficient to invoke our direct appeals jurisdiction that there was an inherent construction of a constitutional provision in the judgment appealed from, but rather there must be an express ruling by the trial court which explains, defines, or overtly states a view which eliminates some existing doubt as to a constitutional provision in order to support a direct appeal.[2] Our direct appeals jurisdiction is not properly invoked merely because the trial court may apply a constitutional provision to the facts before it, but rather is properly invoked as to construction of a constitutional provision only where the trial court has expressly construed the constitutional provision involved.[3] With these principles in mind, we shall examine the several issues raised on appeal to determine if our direct appeals jurisdiction has been properly invoked.

VALIDITY OF SEARCH

[2] By motions to suppress, appellant attacked the admissibility of various items of evidence obtained by the police in a search of his home. Appellant asserts that any "consent" that he gave to the search was vitiated by the fraud and duress he asserts were practiced upon him by the police officers conducting the search, thus invalidating the consent and making the search unreasonable in that the officers did not have a warrant and that the search was not, according to appellant, pursuant to a lawful arrest. A brief description of the background of the search may be helpful.

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[2]Rojas v. State, 288 So.2d 234 (Fla.1973); Ogle v. Pepin, 273 So.2d 391 (Fla.1973); Armstrong v. City of Tampa, 106 So.2d 407 (Fla. 1958).

[3]Rojas v. State, supra.

Appellant, a 78-year-old man, reported to the police that his wife was missing. Police officials later found the dismembered portions of a woman's body, wrapped in plastic bags, along the banks of a canal in the city; this body was identified as the body of appellant's wife (although appellant has made some effort to attack this identification). After the identification had been made, two police officers went to appellant's house and informed him that they would like to search the house in connection with the investigation of the disappearance of his wife. Appellant agreed to this proposition, and signed a consent form. Appellant now asserts that this apparent consent was invalid, in that (1) the police officers deceived him by not notifying him that a body identified as that of his wife had been discovered, (2) the situation of two policemen confronting a man of his age was fraught with coercion, (3) the police officers failed to warn appellant of his right not to consent to the search or any of his other "Miranda" rights, and (4) that he was not competent to give a valid consent. The trial court denied the motions to suppress.

Inasmuch as the question presently before us is whether or not our direct appeals jurisdiction has properly been invoked, we do not reach the merits of the issue as to whether the search in question was valid; our sole concern at present is whether this issue is properly before us. We hold that it is not.

In determining that the search in question was valid, the trial court did not have presented to it any issue of statutory validity, and did not rule on the validity of any statute, federal or state. Nor did the trial court expressly construe, define or overtly explain the meaning of any constitutional provision. In fact, it would be difficult to say

that the trial court had even inherently construed a constitutional provision, and we have previously indicated that the inherent construction of a constitutional provision would not support a direct appeal to this Court.[4] In ruling upon the motions to suppress, the trial court merely applied undisputed propositions of law to the facts it found to exist in the instant case, and in so doing found the motion not to be well-founded. Even if the trial court ruling on the motion is erroneous, it would not support a direct appeal to this Court. Accordingly, jurisdiction in this Court upon direct appeal may not be founded upon the issue of validity of the search.

PETIT JURY ATTACK

[3] By motions, appellant attacked the petit jury venire from which a jury was to be impaneled to try him, asserting that the means by which such venire was selected were constitutionally improper in that certain "clearly identifiable groups" were excluded; appellant requested an evidentiary hearing on his allegations. This motion was not supported by affidavit based upon information and belief, nor did it state facts sufficient to raise a reasonable suspicion that the jury venire was in fact improperly drawn. We note that the motion in the instant case is identical to that considered in Rojas v. State, 288 So.2d 234 (Fla. 1973), in which we held that the denial of such a motion would not support a direct appeal to this Court, inasmuch as the trial court, by denying the motion, had not passed upon the validity of any statute nor expressly construed any constitutional provision. The motion in the instant case, and the trial court's ruling thereon, is dis-

[4]Ogle v. Pepin, supra.

tinguishable from that presented in Rojas only in the fact that the trial court in the instant case denied the request for an evidentiary hearing.

Our disposition of a similar challenge in Rojas upon the grand jury there involved is appropriate here as to the denial of an evidentiary hearing on the petit jury challenge. In Rojas we observed that a court is not required to permit a full-scale investigation of its jury array until it has been shown to be suspect, and that to make such a showing the challenger must assert facts tending to raise a reasonable doubt as to whether the panel may be improperly constituted.[5] In the instant case, appellant's attack on the petit jury panel did not present any factual basis upon which a reasonable suspicion of improper selection methods could arise, but only presented the bare conclusory statements of the motion, unsupported by so much as an affidavit based upon information and belief. Appellant asserts that the hearing he requested would have produced the evidence that the petit jury panel was improperly drawn, and directs our attention to State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963), in which it was held that the trial court had erred in not allowing an evidentiary hearing and the subpoenaing of records in an attempt to show discrimination in the selection of a grand jury. However, there, unlike the instant case, the attack on the panel was supported by an affidavit of counsel, asserting certain facts based on information and belief, supporting the motion. Even this minimal factual support for the motion was lacking in the case before us today, appellant neither having made a showing that the panel

[5]Rojas v. State, supra. See also United States v. Hoffa, 349 F.2d 20 (CA 6, 1965), and Windom v. United States, 260 F.2d 384 (CA 10, 1958).

was suspect nor having presented an affidavit showing a factual basis upon which such a suspicion could properly rest. We have only the bare conclusory statements of the motion itself; this is insufficient.

To summarize, the trial court in denying the appellant's request for an evidentiary hearing on the petit jury challenge did not pass upon the validity of any state or federal statute, nor did it construe any constitutional provision; rather, the trial court merely ruled that the motion did not present a sufficient basis for an evidentiary hearing, and that the attack upon the petit jury panel was not well founded. Our direct appeals jurisdiction may not properly be invoked upon this ground.

EVIDENTIARY HEARING ON GRAND JURY CHALLENGE

[4] It appears that the appellant has waived his right to attack the composition of the grand jury by failing to timely raise his objections pursuant to F.S. § 905.03, F.S.A., and F.S. § 905.05, F.S.A. Seay v. State, 286 So.2d 532 (Fla. 1973). Nonetheless, we shall proceed, as we did in Seay, to consider the merits of the grand jury attack, inasmuch as a justiciable issue of constitutionality if presented.

Appellant has asserted by various motions that the grand jury which returned the indictment against him was improperly constituted in that it discriminatorily excluded certain "identifiable groups" (specified in the motions) from the grand jury master list, and sought to prove his charge of discriminatory selection of the grand jury pool by deposing the grand jury commissioners and

clerk of the grand jury commission and by examining the Dade County Grand Jury Master List. The motion for production of the grand jury master list was denied, as was the motion for permission to depose the chairman and clerk of the grand jury commission. Appellant also sought to dismiss the information against him, which was based upon the underlying indictment of the grand jury. These motions to dismiss involved two separate attacks:

(1) a claim that the composition of the grand jury pool was in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution, and

(2) a contention that Chapters 57-550 and 70-1000, providing for the means by which the grand jury pool was selected, were unconstitutional in various regards.

The second issue of statutory validity raised in these motions was separately dealt with in appellant's brief, and will be separately dealt with hereafter.

We first consider the assertion in (1) above that the composition of the grand jury pool was unconstitutionally discriminatory and the related complaint that appellant's rights have been violated by denying him the means by which to prove this allegation. Both of these propositions have been previously considered by this Court in Rojas v. State, supra, and have been decided adversely to appellant. The only material distinction between the attack made here and that made in Rojas is that appellant here, unlike the appellant in Rojas, wished to depose the chairman and clerk of the grand jury commission, on grounds

that the deposition was material and relevant to his challenge to the grand jury pool. Here, as in Rojas, the appellant's assertions that the grand jury pool was improperly drawn were not supported by any factual assertions sufficient to raise a suspicion that the grand jury pool was in fact improperly constituted, and, as in Rojas, the attack was not supported by an affidavit setting forth facts sufficient to raise a reasonable suspicion that the grand jury pool might in fact have been improperly constituted.

[5] Before a court will be required to permit a full-scale investigation of its jury panel, the panel must be shown to be suspect,[6] and no such showing was made in the instant case. This requirement of showing a factual basis for the challenge in order to require a full-scale investigation of the panel does not, of course, require that the challenger show the panel to be improperly constituted, but it does require that the challenger assert facts tending to raise a doubt as to whether the panel may be improperly constituted; if such factual assertions are made, in inquiry will then follow to see if such suspicion, duly alleged, is supported by proof. In the present case, no such factual basis was asserted for the challenge, and the trial court merely ruled upon a motion which it found not to be well founded.

[6] The trial court did not deal with the validity of any statute in denying the request for evidentiary hearing, the motion for production of the grand jury master list, or the motion to depose the chairman and clerk of the grand jury commission; nor did the trial court expressly con-

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[6]Ibid.

strue any constitutional provision in so ruling. Accordingly, our direct appeals jurisdiction was not properly founded upon such rulings.

In denying that portion of the motion to dismiss which was based upon an assertion that the grand jury panel had been improperly drawn (other than the statutory attack discussed below), the trial court also did not pass upon the validity of any statute nor expressly and overtly construe any constitutional provision. Rather, the trial court passed upon a motion which was without any factual support. Accordingly, the only basis upon which we may review this case upon direct appeal is if our direct appeals jurisdiction has been properly invoked by appellant's assertion that Chapters 57-550 and 70-1000 are unconstitutional.

STATUTORY VALIDITY

[7] The final point raised by the motion to dismiss was the constitutional validity vel non of Chapters 57-550, Laws of Florida, 1957, and 70-1000, Laws of Florida, 1970, setting forth the method by which the Dade County Grand Jury Pool was selected. By denying the motion to dismiss on this ground, the trial court inherently held these statutes to be constitutional under appellant's attack. We therefore have jurisdiction under Article V, § 3(b)(1), of our constitution to accept and hear a direct appeal upon this statutory point. This is founded upon the inherency doctrine as to a statute's invalidity, as distinguished from our constant rejection under the plain constitutional language of purported jurisdiction based upon "construing" the constitution. As we have so emphatically reiterated, one does not "construe" silently or "inherently", but

only by express overt language and statements, which can offer some "construction" for our review.[7]

[8] We find, however, that the resolution of this issue is controlled by our decisions in the companion cases of Seay v. State and Silvia v. State, reported together at 236 So.2d 532 (Fla. 1973). The district court, of course, did not have the benefit of these later decisions when it transferred the immediate cause here. We affirm the ruling of the trial court upholding the validity of Chapters 57-550 and 70-1000 on the basis of these decisions.

Having thus determined the only issue properly before us on direct appeal, and in the interests of judicial efficiency, we remand all remaining issues to the District Court of Appeal for the Third District.[8]

It is so ordered.

CARLTON, C. J., and ROBERTS and ADKINS, JJ., concur.

ERVIN, J., dissents.

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[7]Ogle v. Pepin, 273 So.2d 391 (Fla.1973); Armstrong v. City of Tampa, 106 So.2d 407 (Fla.1958)

[8]We do not intimate by this decision that we could not, in our discretion, properly resolve all points raised by appellant, having properly acquired jurisdiction under Art. V, § 3(b)(1), it being clear that we may dispose of these points once jurisdiction is acquired. Roberts v. State, 181 So.2d 646 (Fla.1966). We have not chosen to do so in this instance.

AMENDMENT V
UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, on in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI
UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV
UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 905

GRAND JURY

905.01 Number and procurement of grand jury.

905.02 Who may challenge.

905.03 Ground for challenge to panel.

905.04 Grounds for challenge to individual prospective grand juror.

905.05 When challenge or objection to be made.

905.06 How challenge made and tried.

905.07 Effect of sustaining challenge to panel.

905.01 Number and procurement of grand jury.—

(1) The grand jury shall consist of not less than fifteen nor more than eighteen persons. The provisions of law governing the qualifications, disqualifications, exemptions, drawing, summoning, supplying deficiencies, compensation, and procurement of petit jurors shall apply to grand jurors.

(2) The judge of any circuit court may dispense with the convening of the grand jury at any term of court by filing a written order with the clerk of court directing that a grand jury not be summoned.

History.—§80, ch. 19554, 1939; CGL 1940 Supp. 8663(80); §41, ch. 70-339.
cf.—§40.01 Qualifications and disqualifications of jurors.

905.02 Who may challenge.—The state or a person who has been held to answer may challenge the panel or individual grand jurors.

History.—§81, ch. 19554, 1939; CGL 1940 Supp. 8663(81); §42, ch. 70-339.

905.03 Ground for challenge to panel.—A challenge to the panel may be made only on the ground that the grand jurors were not selected according to law.

History.—§82, ch. 19554, 1939; CGL 1940 Supp. 8663(82); §42, ch. 70-339.

905.04 Grounds for challenge to individual prospective grand juror.—

(1) The state or a person who has been held to answer may challenge an individual prospective grand juror on the ground that the juror:

(a) Does not have the qualifications required by law;

(b) Has a state of mind that will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging;

(c) Is related by blood or marriage within the third degree to the defendant, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted.

(2) The state may challenge an individual prospective grand juror on the ground that the prospective juror is surety on the bail undertaking of any person whose case will come before the grand jury.

History.—§83, ch. 19554, 1939; CGL 1940 Supp. 8663(83); §43, ch. 70-339.
cf.—§§40.01, 40.07 Qualifications of jurors.

905.05 When challenge or objection to be made.—A challenge or objection to the grand jury may not be made after it has been empaneled and sworn. **This section shall not apply to a person who did not know or have reasonable ground to believe, at the time the grand jury was empaneled and sworn, that cases in which he was or might be involved would be investigated by the grand jury.** [empasis added].

History.—§84, ch. 19554, 1939; CGL 1940 Supp. 8663(84); §44, ch. 70-339.

905.06 How challenge made and tried.—Challenges to an individual grand juror or to the panel shall be tried by the court. A challenge to an individual grand juror may be oral, but a challenge to the panel shall be in writing.

History.—§85, ch. 19554, 1939; CGL 1940 Supp. 8663(85); §45, ch. 70-339.

905.07 Effect of sustaining challenge to panel.—If a challenge to the panel is sustained, the grand jury shall be discharged.

History.—§86, ch. 19554, 1939; CGL 1940 Supp. 8663(86).

CHAPTER 57-550

SENATE BILL NO. 478

AN ACT to create a Grand Jury Commission in all counties in this state having a population of four hundred fifty thousand (450,000), or more, according to the last preceding federal census, and generally relating to the grand jury in such counties; and repealing Chapter 26,518, Acts of 1951, Laws of Florida; Chapter 30,225, Acts of 1955, laws of Florida, Chapter 28,468, Acts of 1953, Laws of Florida, and all laws in conflict with the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four hundred fifty thousand (450,000), or more, according to the last preceding federal census.

Section 2. There is hereby created a Grand Jury Commission composed of ten members as follows: the Clerk of the Circuit Court, Chairman of the Board of County Commissioners, County Supervisor of registration, Clerk of the Criminal Court of Record, and the County Judge having served for the longest, continuous term shall, each, be members of the Grand Jury Commission, and the five (5) remaining members of the Grand Jury Commission shall be appointed by the Governor, who shall appoint one (1) member from each County Commissioners' district. The term of office of each of the appointive Grand Jury Commissioners shall be four (4) years, and upon this act becoming a law the Governor of this state shall appoint three (3) Grand Jury Commissioners for a term of four (4) years and two (2) Grand Jury Commissioners for a term of two (2) years, and thereafter all appointive Grand Jury Commissioners shall be appointed for a term of four (4) years. There shall be a Chairman of the Grand Jury Commission to be elected by the members, and the Clerk of the Circuit Court shall be the Secretary.

Section 3. The Grand Jury Commission may employ such clerical assistants as may be necessary in order that it may function properly. The Board of County Commissioners of the County shall pay such assistants such sums as said Board may determine, and shall also furnish the Grand Jury Commission with such supplies and equipment as may be required in order to permit the proper functioning of the Grant Jury Commission. The compensation of such assistants, and the cost of such supplies and equipment, shall be paid out of the Fine and Forfeiture Fund of the County.

Section 4. The grand jurors in each County in this population classification shall be paid the sum of five dollars ($5.00) for each day when in session, or in court, or such sum as the general laws of the State of Florida may provide for the payment of grand jurors, whichever may be the greater. Such payment shall be made as now provided by law. That in addition to all other compensation provided by law, each grand juror shall receive the sum of five cents (5¢) per mile for every mile necessarily traveled in going from home to the courthouse, and return, when on official grand jury duty, whether attending Court, grand jury sessions or other grand jury meetings or business.

Section 5. The qualifications of persons to serve as grand jurors are as follows:

(a) Shall be a citizen of the United States of America, and a qualified elector and resident of the County.

(b) Shall be of sound mind, in possession of his, or her natural faculties and not infirm or decrepit.

(c) Shall not have been convicted of a felony or of a misdemeanor involving moral turpitude in any court within or without this state.

(d) Shall not have any pending criminal charges against him, or her, of a felony or of a misdemeanor involving moral turpitude in any court within or without this State.

(e) Shall be of good moral character, and shall be free of any present or past alliances, entanglements and

associations with organized crime or with those associated therewith.

(f) Shall not be a member of any association or organization prohibited or declared to be subversive by the laws of the state of Florida or declared to be subversive by the Attorney General of the United States of America pursuant to law.

(g) Shall be intelligent, well informed and able to read and write the English language understandingly.

(h) Shall not be a public officer or employee of the United States of America, the State of Florida, or any county or city therein, but this prohibition shall not apply to any person serving without compensation, pursuant to the provisions of the United States Selective Training and Service Act, or any future draft law, nor to any person serving in the Militia or National Guard of this State.

(i) Attorneys-at-law shall not serve on the grand jury, and doctors of medicine, dentists and clergymen shall be excused upon request.

(j) Shall not have served on a grand jury in the County within a period of the last five (5) years.

Section 6. The Grand Jury Commission shall meet annually, on or before the first Monday in March of each year, and prepare a list of five hundred (500) names of persons qualified under the provisions of this act, and morally fit to serve as grand jurors, and shall file the same with the Clerk of the Circuit Court; and the names of each of said persons shall be written upon a separate slip of

paper and folded and placed, together with the list itself in a secure metal box to be known as the "GRAND JURY BOX", which shall be securely locked and sealed, and the names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission.

In preparing a list of names of prospective grand jurors, as provided by this act, the Grand Jury Commission shall make such investigation as it may deem necessary to determine the qualifications and moral fitness of persons to serve upon the Grand Jury. That upon the GRAND JURY BOX becoming depleted of names, the Grand Jury Commission shall immediately meet and refill the same, as provided by this act.

If the list of names of prospective grand jurors or the number of names of prospective grand jurors written on slips of paper and placed in the GRAND JURY BOX is more, or less than five hundred (500), it shall not affect the validity of the GRAND JURY BOX or any Grand Jury drawn therefrom.

Section 7. That the Grand Jury shall be drawn as provided by law; however, the members of the Grand Jury Commission shall be notified by the Clerk of the Circuit Court of the time and place of drawing the Grand Jury, and a majority of the members of the Grand Jury Commission shall appear at the drawing of the Grand Jury, and be present when the seal on the GRAND JURY BOX is broken and the box unlocked and when the Grand Jury is drawn, and thereafter the GRAND JURY BOX shall

be locked and resealed by the Grand Jury Commissioners or so many thereof as are present. The Court shall draw from the GRAND JURY BOX a sufficient number of names as the Court determines to be necessary, not less than seventy-five (75), and summonses shall be sent by the Clerk of the Circuit Court to each prospective grand juror, by registered mail, return receipt requested, not less than thirty (30) days prior to the return date for their appearance in Court.

Section 8. This act shall not apply to the Grand Jury drawn for the spring term 1957 of the Circuit Court, but shall be applicable to the fall term 1957 thereof. That on or before September 15, 1957, the Grand Jury Commission shall meet and prepare a grand jury list and the GRAND JURY BOX, as provided by this act, and thereafter the Grand Jury for the fall term of Circuit Court 1957 shall be drawn, as provided herein.

Section 9. The Grand Jury shall be the official custodian of all of its records and all of the records of preceding grand juries, including stenographic notes and transcribed testimony of witnesses testifying before the Grand Jury, and all such records shall be kept in the official headquarters of the Grand Jury, provided, however, that the provisions of this act shall not apply to original indictments, presentments, reports, and similar Grand Jury instruments, documents and papers filed by the Grand Jury in Court or which are required by law to be filed before the Judge or with the Clerk of the Circuit Court. Upon the empaneling of a new Grand Jury the preceding Grand Jury shall surrender all of the official Grand Jury Records to the newly empaneled Grand Jury.

Section 10. That Chapter 26,518, Acts of 1951, Laws of Florida, Chapter 30,225, Acts of 1955, Laws of Florida, and Chapter 28,468, Acts of 1953, Laws of Florida, be and the same are hereby repealed. That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed insofar as they affect the provisions of this act.

Section 11. That if any section, paragraph or other part of this act is declared invalid, or unconstitutional, it shall not affect the remainder thereof.

Section 12. This act shall take effect immediately upon its passage and approval by the Governor, or upon becoming a law without such approval.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 21, 1957.

CHAPTER 70-1000

Senate Bill No. 1478

AN ACT relating to grand jury commissions; in all counties having a population in excess of four hundred fifty thousand (450,000), amending sections 1 and 2 of chapter 57-550, Laws of Florida, 1957; providing that the grand jury commission be composed of the circuit judges of the judicial circuit encompassing the geographical area of the county; providing for a chairman and secretary; providing all laws and parts of laws in conflict herewith be repealed; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1 of Chapter 57-550, Laws of Florida, 1957, is amended to read:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four hundred fifty thousand (450,000) or more, according to the last previous federal census.

Section 2. Section 2 of Chapter 57-550, Laws of Florida, 1957, is amended to read:

Section 2. There is hereby created a grand jury commission composed of the circuit judges of the judicial circuit encompassing the geographical boundaries of all counties referred to in section 1 of this act. The chairman of the grand jury commission shall be elected by its members and the clerk of the circuit court shall be the secretary of the grand jury commission.

Section 3. All laws and parts of laws in conflict herewith are repealed.

Section 4. This act shall take effect September 1, 1970.

Vetoed by the Governor July 5, 1970.

Passed the Senate and House over the Veto October 9, 1970.

Filed in Office Secretary of State October 13, 1970.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY SPRING TERM, 1972

STATE OF FLORIDA

vs.

JOHN DYKMAN,

DEFENDANT.

INDICTMENT
FIRST DEGREE MURDER

(Filed September 25, 1972)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, State of Florida, upon their oaths, present that between the 1st day of June, 1972 and the 31st day of July, 1972, within the County of Dade, State of Florida, JOHN DYKMAN, unlawfully and from a premeditated design to effect the death of one OLIVE DYKMAN, did kill and murder the said OLIVE DYKMAN by strangling her, a further and more particular description thereof being to the Grand Jurors unknown, contrary to Section 782.04 of the Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

/s/ William F. Quesenberry, Jr.

WILLIAM F. QUESENBERRY, JR.
FOREMAN OF THE GRAND JURY

CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA IN AND FOR
DADE COUNTY

STATE OF FLORIDA
vs.
JOHN DYKMAN,
DEFENDANT.

INDICTMENT
FIRST DEGREE MURDER

(Filed September 19, 1972)

A TRUE BILL

/s/ William F. Quesenberry, Jr.
FOREMAN OF THE GRAND JURY

I HEREBY CERTIFY that I have advised the Grand Jury, as authorized by law, on the attached indictment.

/s/Richard E. Gerstein
RICHARD E. GERSTEIN, State Attorney

Presented and filed in Open Court,
in the presence of the Grand Jury,
this 19 day of September, 1972.

E. B. LEATHERMAN,
CLERK, CIRCUIT COURT

BY /s/ E. N. Lamay
DEPUTY CLERK

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA, AUGUST TERM, 1972

72-7068

THE STATE OF FLORIDA
vs.
JOHN DYKMAN

INFORMATION FOR FIRST DEGREE MURDER

(Filed September 20, 1972)

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

SEYMOUR GELBER, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that JOHN DYKMAN between the 1st day of June, 1972 and the 31st day of July, 1972, in the County and State aforesaid, did unlawfully and feloniously and from a premeditated design to effect the death of one OLIVE DYKMAN, kill and murder the said OLIVE DYKMAN, by strangling her, a further and more particular description thereof being to the State Attorney unknown, in violation of Section 782.04 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

/s/ Seymour Gelber

Assistant State Attorney,
Eleventh Judicial Circuit of Florida

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true and which facts, if true, would constitute the offense therein charged.

PROSECUTION INSTITUTED IN GOOD FAITH
AND SUBSCRIBED UNDER OATH

/s/ Seymour Gelber

Assistant State Attorney,
Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 29 day of September, 1972.

J. F. McCracken, Clerk
Criminal Court of Record, Dade
County, Florida

By: /s/ Suzanne O'Neill, D. C.

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA, OCTOBER TERM, 1972

THE STATE OF FLORIDA
vs.
JOHN DYKMAN

INFORMATION FOR FIRST DEGREE MURDER

(Filed October 13, 1972)

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that JOHN DYKMAN between the 1st day of June, 1972 and the 31st day of July, 1972, in the County and State aforesaid, did unlawfully and feloniously and from a premeditated design to effect the death of one OLIVE DYKMAN, kill and murder the said OLIVE DYKMAN, by strangling her, a further and more particular description thereof being to the State Attorney unknown, in violation of Section 782.04 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

/s/ Richard E. Gerstein
State Attorney,
Eleventh Judicial Circuit of Florida

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who being first duly sworn, says that the allegations as set forth in the foregoing Information are based upon facts alleged in that certain Indictment presented by the Grand Jury of Dade County, Florida, and filed in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for the County of Dade, Spring Term, 1972, in the case of the State of Florida, Plaintiff, vs. JOHN DYKMAN, Defendant, charged with the offense of FIRST DEGREE MURDER, and which facts stated in said Indictment, if true, would constitute the offense charged in the above and foregoing Information.

/s/ Richard E. Gerstein

State Attorney,
Eleventh Judicial Circuit of Florida

AND SUBSCRIBED UNDER OATH

Sworn to and subscribed before me this 10 day of October, 1972.

J. F. McCracken, Clerk
Criminal Court of Record,
Dade County, Florida

SEAL: CRIMINAL COURT OF RECORD

By: /s/ D. N. Reagan, D.C.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 72-7068 (Rowe)

STATE OF FLORIDA,

Plaintiff,

vs.

JOHN DYKMAN,

Defendant.

MOTION TO DISMISS UNDERLYING INDICTMENT AND INFORMATION AND FOR EVIDENTIARY HEARING

COMES NOW the Defendant, JOHN DYKMAN, by and through his undersigned attorney and respectfully moves this Honorable Court to dismiss the underlying Indictment and Information herein, and to declare Chapter 57-550, and Chapter 70-1000 of the Laws of the State of Florida unconstitutional, and further for an Evidentiary Hearing and as grounds therefor Defendant would show as follows:

1. The Indictment herein is insufficient as a matter of law.

2. The Indictment herein was returned by the Spring, 1972, Dade County Grand Jury, which was drawn from an improperly constituted jury pool. Said Grand Jury pool purposefully discriminated against the following classes of people in violation of the Fourteenth Amendment to the United States Constitution: black persons; persons with

incomes less than $8,000.00 per year, and low income persons generally; women; blue-collar workers; persons between the ages of eighteen, nineteen and twenty, and persons between the ages of twenty-one and thirty-four; persons over sixty years of age; persons with less than a twelfth-grade education; persons of Latin American decent; persons in the southern most part of Dade County, and the northern most part of Dade County, persons from "inner city" and generally black "ghetto" areas; and persons who have registered to vote in Dade County within the last three months.

3. The method of selecting the names which constitute the Dade County Grand Jury pool, as set forth in Chapter 70-1000 of the Laws of Florida, 1970, which amends Chapter 57-550, Laws of Florida, 1957, and as described more fully in the depositions of the Honorable E. B. Leatherman and the Honorable Marshall C. Wiseheart, in Dade County Circuit Court Criminal Case No. 2866, said depositions taken on the 23rd of February, 1972, violates the Fourteenth Amendment to the Constitution of the United States on its face, and as applied to the Defendant in this cause.

4. The Grand Jury was drawn from a pool which systematically excluded all members of the enfranchised eighteen, nineteen and twenty-year old age group, who had registered to vote in the State of Florida, as well as all those persons who have registered to vote within the three months prior to empanelling said jury.

5. This challenge to the array and method of selecting the Dade County Grand Jury is brought pursuant to Florida Rule of Criminal Procedure 3.300, et seq., and F.S. 905.01, et seq., including but not limited to F.S. 905.03.

6. The Grand Jury, as previously drawn and constituted in Dade County, denied the Defendant the right to be brought to trial based upon an Indictment voted by an impartial Grand Jury of his peers, nor by a Grand Jury drawn from a pool truly representative of a cross-section of the community, as required by the Fourteenth Amendment to the United States Constitution and further said Grand Jury pool as constituted in Dade County is not a body truly representative of the community.

7. Chapter 57-550, Section 5, Laws of Florida, 1957, states and creates qualifications for persons to serve as Grand Jurors which are greater than the qualifications necessary to serve as a petit juror under F.S. 40.01, and further as Section 5 is drawn, violates Defendant's right to equal protection of law and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution in that said qualifications are vague, ambiguous, overbroad, incapable of being carried out, and further repose in the Dade County Grand Jury Commissioners an unlawful delegation of authority; moreover, Chapter 70-1000, Laws of Florida, 1970, which amended Chapter 57-

550, Laws of Florida, 1957, to provide that the Grand Jury Commission in and for Dade County is composed of the Circuit Judges in said county, results in an unconstitutional conflict of interest, deprivation of the basic privileges and immunities granted to the Defendant, and violates the basic constitutional principle of checks and balances between the Judicial and Executive Branches of the State and Federal Government.

8. The Defendant further contends that he is entitled to an Evidentiary Hearing on the allegations of that set forth herein and is further entitled to examine the original master list of the Dade County Grand Jury, from which the instant Grand Jury was drawn, in order to show that said pool has been drawn and selected contrary to the Fourteenth Amendment.

WHEREFORE, the Defendant respectfully prays that this Honorable Court will dismiss the underlying Indictment and Information herein, or in the alternative, declare Chapter 57-550 Laws of Florida, 1957, and Chapter 70-1000, Laws of Florida, 1970, unconstitutional, and in addition grant the Defendant an Evidentiary Hearing on the issues of fact.

Respectfully submitted,

/s/ Joel Hirschhorn

JOEL HIRSCHHORN
Attorney for Defendant
1040 City National Bank Building
25 West Flagler Street
Miami, Florida

[CERTIFICATE OF SERVICE OMITTED]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 72-7068 (Rowe)

STATE OF FLORIDA,

Plaintiff,

vs.

JOHN DYKMAN,

Defendant.

MOTION TO DISMISS INFORMATION

COMES NOW the Defendant, JOHN DYKMAN, by and through his undersigned attorney and respectfully moves this Honorable Court to dismiss the within Information herein and as grounds therefor would show as follows:

1. The said Information is based upon an Indictment returned by the Dade County Grand Jury, and said Grand Jury is illegally constituted and organized under the laws of the State of Florida as written and as applied.

2. Florida Statute 40.01, which sets up the qualifications for Grand Jurors, and Chapter 57.550, Laws of Florida, 1957; and Chapter 70.1000, Laws of Florida, 1970, are all unconstitutional, arbitrary, vague, ambiguous and violate Defendant's Sixth and Fourteenth Amendment privileges and rights.

3. The Information is insufficient as a matter of law in that it fails to set forth with sufficient specificity the charge of which the Defendant stands accused and by virtue thereof said Information must be dismissed.

4. The Information herein is vague and ambiguous and insufficient as a matter of law.

5. The Information is insufficient as a matter of law in that it fails to comply with Rule 3.140(g) of the Florida Rules of Criminal Procedure in that there is no statement that the Information is instituted "in good faith".

6. The Information fails to comply with Rule 3.140 of the Florida Rules of Criminal Procedure in that the acknowledgement taken in said Information by one Suzanne O'Neill was improperly taken in that said Suzanne O'Neill has previously testified in Open Court herein on October 6, 1972, that she is not a Notary Public, that she is employed by the State Attorney's Office, and thus has no statutory or other authority to take an acknowledgment from the Prosecuting Attorney, and further the merger of an employee of the State Attorney's Office with the judicial process itself violates the mandate of the United States Supreme Court in Shadwick v. City of Tampa, ___ U.S. ___, 40 U.S.L.W. 4758 (June 19, 1972); and Coolidge v. New Hampshire, ___ U.S. ___, 91 S.Ct. (1971), both of which require that the accusatory instrument be issued by a "detached and neutral" person.

WHEREFORE, Defendant respectfully prays that this Honorable Court will dismiss the within Information with prejudice and at the cost of Plaintiff.

Respectfully submitted,

/s/ Joel Hirschhorn

JOEL HIRSCHHORN
Attorney for Defendant
1040 City National Bank Building
25 West Flagler Street
Miami, Florida

[CERTIFICATE OF SERVICE OMITTED]

[TITLE OMITTED]

MOTION FOR PRODUCTION OF GRAND JURY MASTER LIST

COMES NOW the Defendant, JOHN DYKMAN, by and through his undersigned attorney and respectfully moves this Honorable Court for the entry of an order requiring the Chairman and/or the Secretary of and to the Dade County Grand Jury Commission to produce for the Defendant's inspection and copying the Master Grand Jury List from which the Grand Jury which indicted the Defendant herein was drawn and as grounds therefor the Defendant would show that the Florida Supreme Court has held in **Demetree v. State,** 213 So.2d 709 (1968), that

it is the composition of the Grand Jury List and not the particular Grand Jury which returns the indictment which determines equal protection of the law has been denied.

Respectfully submitted,

/s/ Joel Hirschhorn

JOEL HIRSCHHORN
Attorney for Defendant
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25 West Flagler Street
Miami, Florida

[CERTIFICATE OF SERVICE OMITTED]

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 74-57

JOHN DYKMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION AND APPENDIX

ROBERT L. SHEVIN
Attorney General
State of Florida

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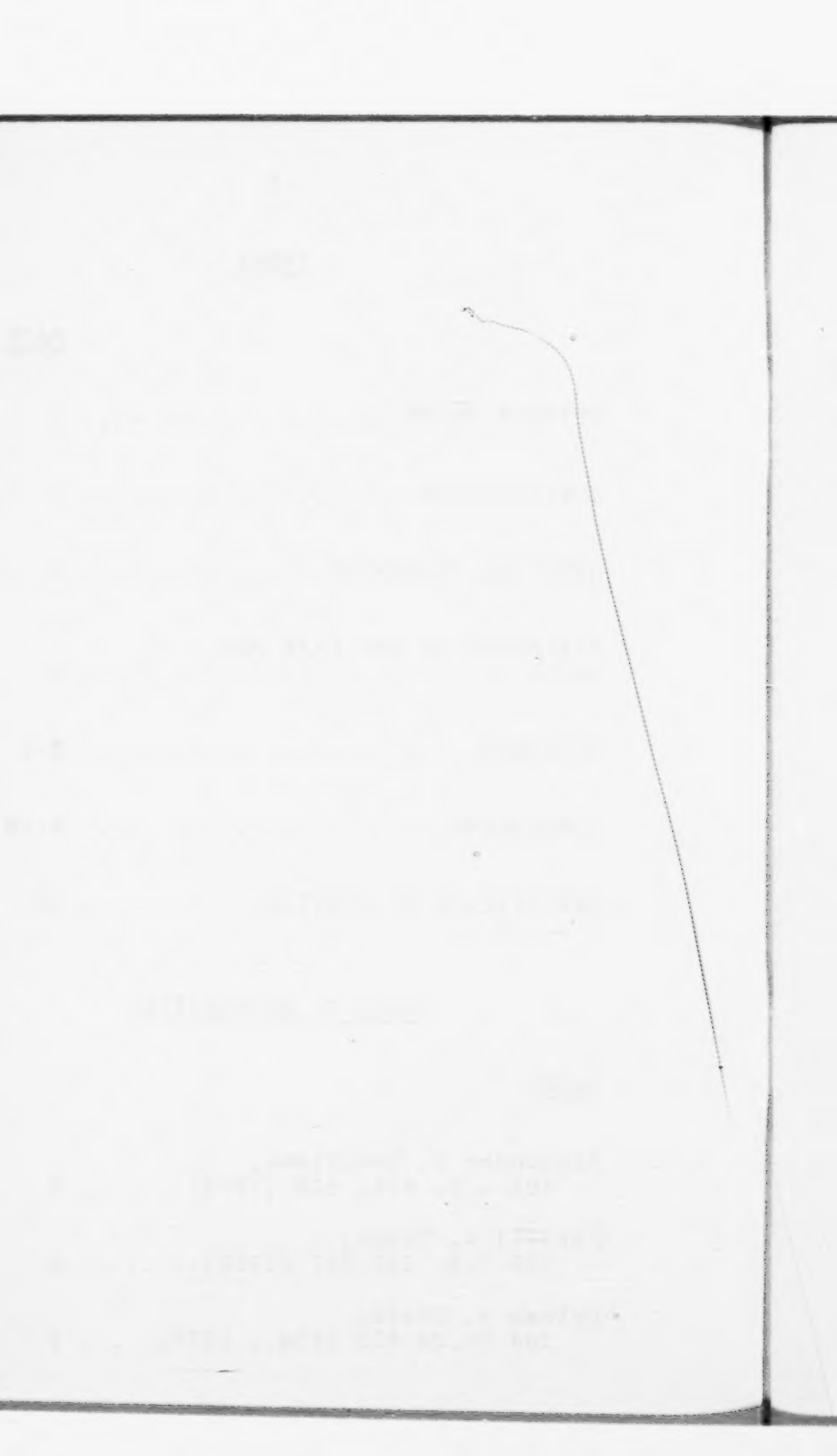

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 294 So.2d 633 (Fla., 1973), and is attached to petition for writ of certiorari as Appendix 1-7.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW HOLDING THAT THERE WAS NO VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS IN THE SUMMARY DENIAL OF PETITIONER'S MOTION ATTACKING HIS GRAND JURY, WHERE THAT MOTION CONTAINED ONLY BARE ALLEGATIONS AND CONCLUSIONS DEVOID OF ANY FACTUAL ALLEGATION OR SUPPORTING PROOF.

STATEMENT OF THE CASE AND FACTS

The respondent adopts the Statement of the Case and Facts as set out by the petitioner.

ARGUMENT

Prior to trial the petitioner filed a motion to attacking the composition of the Grand Jury which had issued his indictment as well as the selection procedures for the petit jury which was to serve at his trial. Both attacks were considered and ruled upon by the Supreme Court of Florida, although the instant case raises only the petitioner's Grand Jury attack.

Petitioner was found guilty of murder in the second degree after a jury trial upon a charge of first degree murder of his wife. His appeal, filed in the District Court of Appeal of Florida, Third District, was transferred by that court to the Supreme Court of Florida, on an issue of original jurisdiction pursuant to Florida Constitution Article V §3 (b) (1). The Supreme Court of Florida accepted the transfer only as to the issue of grand jury selection, the same issue upon which the instant petition is based. The Florida Supreme Court after briefing and oral argument denied relief. Dykman v. State, 294 So.2d 633 (Fla., 1974).

Thereafter, the case proceeded as a "bifurcated" appeal. The remaining six issues, on which the Florida Supreme Court did not accept transfer, were heard by the District Court of Appeal, Third District, which court affirmed the conviction on September 10, 1974, rehearing denied October 14, 1974. Dykman v. State, 300 So.2d 695.

This latter decision is presently on review by petition for certiorari to the Supreme Court of Florida, filed November 12, 1974. (Exhibit A, attached herewith). Said case seeks review of the same conviction presently before this Court in the instant case. Petitioner is therefore simultaneously seeking reversal of the same conviction from the Supreme Court of Florida and the Supreme Court of the United States. Should the Supreme Court of Florida grant relief while the instant case is here pending, it would effectively moot the issues presented before this Honorable Court.

In the motion to dismiss his indictment, the petitioner alleged that the Grand Jury which had indicted him was drawn from an improperly constituted jury pool. As grounds therefore, it was alleged that the Grand Jury Pool purposely discriminated against several classes of people specified as follows:

1. Black persons,
2. Persons with incomes less than $8,000 per year, and low-income

persons generally,
3. Women
4. Blue collar workers
5. Persons between the ages of 18, 19 and 20,
6. Persons between the ages of 21 and 34,
7. Persons over 60 years of age
8. Persons with less than a 12th grade education
9. Persons of Latin American decent
10. Persons in the southern most part of Dade County and the northern most part of Dade County
11. Persons from the "inner city" and generally black "ghetto" areas
12. Persons who have registered to vote in Dade County within the last three months.

No further specific allegations were made as to the basis for the alleged invalidity of these classifications and no underlying facts were alleged. On the motion as presented the trial court denied the requested relief and denied the petitioner an evidentiary hearing. After conviction, this ruling was assigned as error to the Supreme Court of Florida and was ruled upon in that court. In affirming the decision of the trial court the State Supreme Court based its ruling not as petitioner alleges by weighing constitutional rights against the interest of the State in judicial administrative efficiency, but rather on the inherent insufficiency of the petitioner's motion. The motion was purely conclusory in nature and contained no factual allegations upon which the court could ascertain the basis for judging the legal sufficiency of the motion. In so holding, the

court was following well established State and Federal law that before a full scale investigation of the State's jury processes is warranted, it is incumbent on the petitioner to allege some factual basis from which it may be determined that the jury pool can be deemed to be suspect. United States v. Hoffa, 349 F.2d 20 (6th Cir., 1965); Windom v. United States, 260 F.2d 384 (10th Cir., 1958).

The instant case raises the same issues as were presented to this court in Silva v. Florida and Seay v. Florida, United States Supreme Court, Case No. 73-6549, and Rojas v. Florida, United States Supreme Court Case No. 73-6669. In all three cases this Court recently denied certiorari on October 15, 1974. Since the facts and issues are here substantially similar, it is respectfully submitted that the instant case presents no better grounds for the issuance of a writ of certiorari.

Under Florida law Grand Jury records and proceedings are secret and may only be disclosed for certain limited purposes and under particularized circumstances. Gonzalez v. State, 220 So.2d 393 (Fla., 3rd DCA, 1969). Chapter 57-550, Laws of Florida, in Section 6 thereof provides that the names

> "...of each of said persons shall be written upon a separate slip of paper and folded and placed, together with the

> list itself in a secure metal-box to be known as the 'Grand Jury Box', which shall be securely locked and sealed and the names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission."

The seal may be broken and the box opened only when the Grand Jury is drawn. Thereafter, the box must be again locked and resealed by the Grand Jury Commissioners. The obvious intent of the above legislation is that the names of those citizens placed upon the Grand Jury Master List and serving upon a particular Grand Jury shall remain a secret until the conclusion of their service. Accordingly, in seeking disclosure of such information provided by State law to be secret, the burden is on the accused to plead and prove, with the greatest accuracy and precision, the irregularities in the selection of the grand jurors which are claimed to have vitiated an indictment. State v. Demetree, 213 So.2d 709, 713 (Fla., 1968).

For a petitioner to establish a constitutional violation of the type here attempted, he must first prove that the group allegedly excluded constitutes a

distinguishable or cognizable class. In addition to the failure to allege any factual bases for petitioner's contentions as discussed above, there is the additional failure to specify any use of the selection system by officials so as to intentionally or unintentionally result in an invalid array of jurors. Since Federal court faced with this issue have been reluctant to conclude the presence of constitutional violations in the absence of any allegations that the group excluded constitutes a distinct and separate class, the failure of the instant petitioner to so plead was a most serious omission.

A cognizable class for the purpose of jury challenges has been defined as one which has a definite composition, that is, which contains some factor which defines and limits the group. It is not one whose membership shifts from day to day or whose members can be arbitarily selected. The group must have cohesion as well as some basic similarity in attitudes or ideas or experience which is present in the members of the group and which can not be adequately presented if the group is excluded from the jury selection process. Thus, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. United States v. Guzman, 337 Supp. 140 (S.D.N.Y., 1972); affirmed 468 F.2d 1245 (2nd Cir., 1972). Thus, age as

a measure of representation has been disfavored as a criteria for jury standards when drawing age brackets are arbitrarily drawn in order to constitute categories for measuring the legality of jury selection. United States v. DiTommaso, 405 F.2d 385 (4th Cir., 1968); United States v. Gooding, 473 F.2d 425 (5th Cir., 1973). Similarly, a one year residence requirement for persons serving on federal grand and petit juries was held not to be an unconstitutional requirement in United States v. Perry, 480 F.2d 147 (5th Cir., 1973), where as a result no cognizable group was excluded.

Moreover, petitioner's allegations do not amount to a prima facie showing of systematic exclusion of necessary groups from his grand jury. It has been held that in order to make a prima facie showing of systematic exclusion from the grand jury petitioner would have the burden of proving first that the opportunity for discrimination existed by reason of the use of a biased source of potential jurors, and second that the use of such an infected source produced a significant disparity between the percentages in the source and the percentage on the grand jury panel. Wright v. Smith, 474 F.2d 349 (5th Cir., 1973). Since there need not be proportional representation on the grand jury of each element of the population entitled to serve, Cassell v. Texas, 339 U.S. 282-287 (1950), it is necessary to establish more than statistical probabilities in order to establish a prima

facie case. Alexander v. Louisiana, 405 U.S. 625, 629 (1972); Whitus v. Georgia, 385 U.S. 545, 552 (1967). Alexander requires in addition that there be an opportunity for discrimination in addition to a showing of steady underrepresentation of a cognizable class of citizens on the jury panels for an appreciable period of time.

Petitioner's conclusory allegations on all these counts foreclosed the possibility that the trial judge could ascertain whether there was any legal basis for petitioner's ultimate conclusions. In the absence of any factual allegation upon which petitioner might be able to establish a prima facie showing based legally sufficient factual allegations, the State courts were eminently correct in determining that an evidentiary hearing was not required.

CONCLUSION

Petitioner's failure to set forth any factual allegations to support his legal conclusions deprived the Supreme Court of Florida of any reasonable basis for concluding the instant Grand Jury was constitutionally suspect. That same deficiency renders insubstantial the federal question here presented. It is respectfully

submitted that this Court should deny jurisdiction.

Respectfully submitted,

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Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Brief of Respondent in Opposition was served upon the HONORABLE JOEL HIRSCHHORN, 1040 City National Bank Building, 25 West Flagler Street Miami, Florida 33130, this____day of December 1974.

WILLIAM L. ROGERS
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APPENDIX

Appendix 1

IN THE SUPREME COURT
OF FLORIDA

JOHN DYKMAN,	**	CASE NO. 46,461
Petitioner,	**	
vs.	**	
THE STATE OF FLORIDA,	**	
Respondent.	**	
	**	

PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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Appendix 2

TO: THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, JOHN DYKMAN, presents this his Petition for a Writ of Certiorari and states:

1. Petitioner seeks to have reviewed a decision of the District Court of Appeal of Florida, Third District, dated September 10, 1974, (R. 1-7). The Petition for Rehearing was denied October 14, 1974, (R. 8).

2. This Petition is presented under and pursuant to Article 5, Section 3, of the Florida Constitution and Rule 4.5(c) of the Florida Appellate Rules.

3. This Petition is accompanied by those necessary portions of the record of the proceedings below, including the decision Petitioner seeks to have reviewed and a supporting brief.

4. The following are the facts of the case:

> (a) "Appellant, a 78 year old man reported to the police that his wife was missing. Police officials later found the dismembered portions of a woman's body, wrapped in plastic bags, along the banks of a canal in the city; this body was identified as the body of appellant's wife, (although appellant has made some effort to attack this identification). After the identification had been made, two police officers went to appellant's house and

> informed him that they would like to search the house in connection with the investigation of the disappearance of his wife. Appellant agreed to this proposition, and signed a consent form. Appellant now asserts that this apparent consent was invalid, in that (1) the police officers deceived him by not notifying him that a body identified as that of his wife had been discovered, (2) the situation of two policemen confronting a man of his age fraught with coersion, (3) the police officers failed to warn appellant of his right not to consent to the search or any of his other 'Miranda' rights, and (4) that he was not competent to give a valid consent. The trial court denied the motions to suppress." Dykman v. State, 294 So.2d 633 (Fla., 1973).

(b) Attorney for Petitioner put into issue petitioner's competency to stand trial and assist counsel in the preparation of his defense. At the hearing on this issue, only one doctor, of the four who examined Petitioner, reached the conclusion that Petitioner was competent to stand trial. This conclusion, however, was based on examination conducted several months before the trial, unlike those conducted by the other doctors prior to trial. The trial court found Petitioner competent to stand trial and assist counsel in his defense.

(c) Petitioner at trial sought to introduce a statement made by a witness, who could not be located, that the witness saw green bags, (allegedly

containing the deceased), floating in the canal at a time neighbors of the Petitioner stated they had smelled a decaying body at Petitioner's residence. Petitioner requested the Court to waive the hearsay rule and permit this relevant and exculpatory testimony to be admitted. The trial court refused to admit the testimony.

(d) During jury deliberations, the jury requested to be reinstructed on Murder in the Second Degree. DYKMAN brought to the Court's attention that all the instructions as to lesser included offenses had to be included. The Court then reinstructed the jury, excluding excusable and justifiable homicide. The jury returned to deliberate and then reached its verdict. The Court then, over DYKMAN'S objection, attempted to rectify its already prejudicial error by reading just the omitted instructions to the jurors and again sent them back to the jury room where within seconds they promptly returned with a conviction of Murder in the Second Degree.

5. On the foregoing facts, the District Court of Appeal, Third District, was presented with the following points of law:

(a) Whether the trial court erred in denying Petitioner's Motion to Suppress Evidence where Petitioner established that the search form executed by Petitioner was not given intelligently, knowingly, freely nor voluntarily and where it was shown that Petitioner had not been advised of his right

to refuse to consent to the search or his right to an attorney or that anything found would be used against him in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

(b) Whether the trial court erred in declaring the Petitioner competent to stand trial and assist counsel in the preparation of a rational defense where the unrebutted testimony clearly established Petitioner's incompetency to stand trial and assist counsel.

(c) Whether the trial court erred in refusing to permit Petitioner to elicit relevant, material and exculpatory testimony from a prosecution witness on the grounds that such testimony was hearsay even though Petitioner was willing to waive the hearsay objection.

(d) Whether the trial court erred in permitting the trial jurors to deliberate and arrive at their verdict upon improper, defective and prejudicial jury instruction over Petitioner's objection and contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

6. The District Court of Appeal, Third District, presented with these issues and facts rendered the following opinion:

> (a) Competency: Appellant's first point urges that the trial court erred in declaring the appellant competent to stand trial and to assist counsel in his defense. Four medical witnesses testified upon this issue in the proceedings prior to trial.

Based on the testimony of these witnesses, the appellant argues only that the court abused its discretion in finding that the appellant was capable of assisting in his defense. Thus, there is no issue presented as to the actual competency of the appellant who as a seventy-eight year old man, was in full possession of his faculties. Medical expert testimony showed that any claimed lapses of memory could be the product of either (1) appellant's age or (2) the fact that it was convenient for the appellant to fail to remember certain events. Faced with this situation and faced with conflicting testimony, the trial judge did not abuse his discretion in holding that appellant was competent to stand trial. See Brown v. State, Fla. 1971, 245 So.2d 68; Brock v. State, Fla. 1954, 69 So.2d 344; and Pressley v. State, Fla. App. 1972, 261 So.2d 522.

(b) Search: A review of this record convinces us that we cannot fault the trial court upon his finding that the defendant voluntarily consented to the search. See James v. State, Fla.App. 1969, 223 So.2d 52; cf. Powell v. State, 131 Fla. 254, 175 So. 213 (1937). We decline to adopt the

rule proposed by the appellant that a defendant must be separately advised of his right to refuse consent to a search before his consent is given. See United States v. Goosbey, 419 F.2d 818, (6th Cir. 1970).

(c) Hearsay Evidence: The seventh point urges error because the court refused to allow appellant to introduce hearsay evidence which he considered favorable to his defense. He relies upon Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, (1973), and Cox v. State, Fla.App. 1969, 219 So.2d 762.

The holding in Chambers does not justify the admission of hearsay in every case where the defendant wishes to waive the rule. In the instant case the hearsay evidence sought to be admitted was the statement of a third person, who was not present at the trial, allegedly made to the police officer during his investigation of the crime. If we proceed upon the principle that the basis for the exclusion of hearsay in a trial is the absence of the oath of the person making the statement

and the absence of the opposing party's right to cross-examine as to the truth of the statement, then these absences are not matters which the defendant seeking to introduce the statement may waive. The holding in Chambers v. Mississippi appears to be; "In these circumstances, where constitutional rights directly effecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." We accept this rule as a salutory development in criminal law. In the application of such a rule, it must be pointed out that the Supreme Court in setting forth "these circumstances" said, "The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." The statements referred to were confessions and were found to have been made spontaneously. Also, they were found to be corroborated by other evidence and by the sheer number of independent confessions. And finally, they were found

to fall within the bounds of "penal-interest rationale." The court further found;

"Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and had been under oath. He could have been cross-examined by the State and his demeanor and responses weighed by the jury."

We find no such circumstances to justify the hearsay evidence offered in this case.

In Cox v. State, supra, although the statement was classified as hearsay by the court, it was pointed out that "(t)he witness was under oath and was present in the court room so that he might be cross-examined concerning the description which he gave to the police." No such situation exists in the present instance.

(d) Jury Instructions: Appellant's second point urges reversal on the ground that the trial court allowed the jury to deliberate and arrive at the decision upon improper, ineffective jury instructions. A brief history of the circumstances giving rise to this point should be set out. At the conclusion of the trial,

the court instructed the jury as to the elements of first degree murder and lessor included offenses and an instruction relating to excusable and justifiable homicide was included at defendant's request. No error is urged upon the giving of these instructions. After deliberating for a period of time, the jury requested permission to return to the courtroom in order again to be instructed on first and second degree murder. In response, the court repeated its instructions on murder in the first, second and third degrees, as well as on manslaughter. The appellant objected and urged that the complete instructions to the jury be read under the rule stated in Hodges v. State, Fla. 1965, 172 So.2d 824 and applied in Stills v. State, Fla. App. 1973, 272 So.2d 174 and Tamayo v. State, Fla. App. 1970, 237 So.2d 251. After the jury had been in the jury room for approximately five minutes, it was recalled by the trial court for the purpose of repeating the remainder of the instructions. It was established by testimony of the bailiff

that the jury had in fact announced that it had reached a verdict prior to the time it was recalled by the court. Nevertheless, the jury returned upon the call of the court whereupon the omitted instructions were given and then it returned to the jury room where it very quickly announced again that it had reached a verdict. The verdict of guilty of second degree murder was handed up and recorded.

The Appellant now argues in essence that he was prejudiced in that the jury was permitted to deliberate without benefit of repeated instructions on excusable and justifiable homicide and the summary instructions prescribed by the standard jury instructions to be given at the end of instructions of degrees of homicide.

It is apparent that under the holdings in Hodges, Stills and Tamayo, supra, the failure of the judge to give the entire instructions immediately was error. It is equally apparent, however, that it was not prejudicial error. It is our view that the court's error in failing to give the complete instructions upon the request of the jury for instructions on first and second degree

murder was cured by the court's subsequent giving of the instructions requested by the defendant. See Grant v. State, 33 Fla. 291, 14 So. 757 (1894), where it was held that the verdict of the jury in a case of felony is not complete or conclusive until accepted by the court and recorded. In addition, this court acts upon the record as it stands and not upon our supposition of what the mental processes of the jury may have been. See Van Eaton v. State, Fla. 1967, 205 So. 2d 298. Here, we are presented with a record which shows a complete instruction prior to the jury verdict. Possibility that the jury might have entered some verdict other than guilty of second degree murder if they had had the complete instructions is not supported by any rational argument in this case.

The second reason that we hold the error of failing to give the full instructions upon the first return of the jury is not prejudicial is that under the facts of this case there was never a defense tendered other than "not guilty." There is no contention of self-defense or justifiable homicide. We hold that the reading of the omitted portions of the instructions could not have influenced the

jury in its decision to hold the appellant guilty of second degree murder. Therefore, in this cause where the proof of guilt is clear, we hold that reversible error is not presented under appellant's second point.

7. From this opinion, the Petitioner brings this Petition for Certiorari and would allege further:

(a) Competency: The decision of the District Court of Appeal, Third District, is in conflict with Brock v. State, 69 So.2d 344 (Fla., 1954); Fowler v. State, 255 So.2d 513 (Fla. 1971); Julias v. State, 271 So.2d 807 (Fla., 3rd DCA, 1972); Pressley v. State, 261 So.2d 522 (Fla. 3rd DCA, 1972); Rojas v. State, 296 So.2d 627 (Fla., 3rd DCA, 1974), for the reasons set forth in greater detail in the attached brief.

(b) Search: The decision of the District Court of Appeal, Third District, instanter is in conflict with Dunavant v. State, 46 So.2d 871 (Fla. 1950), as the consent to search was based on a mispresentation and for the reasons set forth in greater detail in the attached brief. Petitioner would further suggest that this Court adopt those principles of law espoused in United States v. Dichiarinte, 445 F.2d 126 (7th Cir., 1971), and Perkins v. Henderson, 418 F.2d 441 (5th Cir. 1969), State v. Williams, 432 P.2d 679 (Oregon 1967), and Schorr v.

State, 499 P.2d 450 (Okl. Cr. 1972); State v. Ganz, 297 So.2d 614 (Fla. 4th DCA, 1974).

(c) Hearsay Evidence: The decision of the District Court of Appeal. Third District, instanter is in conflict with Cox v. State, 219 So.2d 762 (Fla. 3rd DCA, 1969), where the defendant was entitled to waive the hearsay rule and for the additional reasons set forth in the attached brief.

(d) Jury Instruction: The decision of the District Court of Appeal, Third District, instanter is in conflict with Hedges v. State, 172 So.2d 824 (Fla., 1965); Tamayo v. State, 237 So.2d 251 (Fla. 3rd DCA, 1970); and Stills v. State, 272 So.2d 174 (Fla. 1st DCA, 1973), which require a new trial when the trial judge fails to give complete jury instructions when requested by the jurors and for the additional reasons set forth in the attached brief.

WHEREFORE, Petitioner requests this Court to grant a Writ of Certiorari and enter its Order quashing the decision sought to be reviewed and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
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25 W. Flagler Street
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(305) 358-5320

Appendix 15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above foregoing Petition for Writ of Certiorari was hand delivered to the Office of the Attorney General, 8585 Sunset Drive Miami, Florida, this 12th day of November, 1974.

I HEREBY FURTHER CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was hand delivered to the Office of the Clerk, District Court of Appeal, Third District of Fla., 1350 N. W. 12th Avenue, Miami, Fla., this 12th day of November, 1974.

JOEL HIRSCHHORN, ESQUIRE